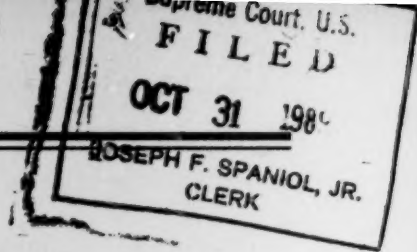


(2)
No. 89-385



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

JOE L. BARR, a/k/a JOSEPH L. BARR,

Petitioner,

—against—

UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

**RESPONDENT UNITED PARCEL SERVICE, INC.'S
BRIEF IN OPPOSITION TO A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

JEFFREY A. MISHKIN
PROSKAUER ROSE GOETZ & MENDELSON
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel for Respondent
United Parcel Service, Inc.

Of Counsel

ALEXANDER H. SCHMIDT

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Questions Presented

Whether the Court of Appeals, in concluding that petitioner had failed to adduce sufficient evidence to sustain a finding of breach of the union's duty of fair representation:

(1) correctly applied this Court's consistent holdings that such a breach may be found only when the union conduct at issue was "arbitrary, discriminatory, or in bad faith"; and

(2) correctly stated and applied the proper standard for ruling on a motion for judgment notwithstanding the verdict.

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BRIEF IN OPPOSITION TO A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

Respondent United Parcel Service, Inc. opposes the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued on February 10, 1989.

Statement Of The Case

Further review of the Court of Appeals' decision dismissing petitioner's breach of duty of fair-representation claim is not warranted. The Court of Appeals carefully considered the record, identified the relevant facts and applied to those facts uniformly accepted legal principles as to which there is no conflict or confusion. The decision below turns on its own facts, has no

impact beyond the specific discharge grievance proceeding at issue, and reaches the just and proper result.

In order not to burden this Court with repetitive arguments, United Parcel Service ("UPS") adopts so much of correspondent Local 804's brief opposing the petition as supports the bases of UPS's opposition set forth below. The proceedings in the courts below and the relevant facts are set forth in the Court of Appeals' opinion.

REASONS FOR DENYING THE WRIT

I.

The Conclusion Of The Court Below, That Petitioner Had Failed To Adduce Sufficient Evidence To Support A Finding Of Breach Of The Duty Of Fair Representation, Was Fully In Accord With The Decisions Of This Court And Other Circuits.

A union's duty of fair representation in the context of a grievance and arbitration proceeding on behalf of a discharged member of the collective bargaining unit has been well defined by this Court. To prove a breach of the duty, the member bears the burden of demonstrating that (i) the union's conduct toward the member was "arbitrary, discriminatory, or in bad faith," *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and (ii) it "seriously undermine[d] the integrity of the arbitral process . . .", *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). These are precisely the standards that were applied below. *Barr v. United Parcel Service, Inc.*, 868 F.2d 36, 43 (2d Cir. 1989).

Arbitrary conduct sufficient to satisfy the first element can be established by proof that the union "arbitrarily ignor[ed] a meritorious grievance or process[ed] it in perfunctory fashion" *Vaca*, 386 U.S. at 191; *Hines*, 424 U.S. at 569. This Court has made plain, however, that

demonstrating breach of duty by the Union . . . involves more than demonstrating mere errors in judgment.

Hines, 424 U.S. at 570-71.

The decision below was a routine application of these well-settled principles to the facts of this case. After an exhaustive review of the record, the Court of Appeals determined that the union, at most, may have committed errors in judgment in its pursuit of petitioner's grievance. Because judgmental errors are not sufficient to support a claim that the union acted either arbitrarily or in bad faith, the court held that the arbitrator's decision upholding petitioner's discharge could not be disturbed. *Barr*, 868 F.2d at 43-44.

Petitioner's contention that the duty of fair representation standards employed below deviate from the standards enunciated by this Court in *Vaca* and *Hines* rests on a misreading of the Court of Appeals' opinion. Each of the arguments that petitioner advances to support the contention is without foundation.

First, the Court of Appeals did not hold, as petitioner asserts, that a breach of duty claim requires "direct proof of an evil motive on the part of the union." (Petition at 17) The standard of arbitrariness applied by the court below required proof of conduct " 'so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.' " *Barr*, 868 F.2d at 43 (quoting *NLRB v. Local 282, International Brotherhood of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984)). That standard does not incorporate a bad faith or "evil motive" requirement. *NLRB v. Local 282*, 740 F.2d at 147 (articulating the standard applied in *Barr* and holding that "arbitrary conduct amounting to a breach is not limited to intentional conduct . . ."). On the contrary, the standard implies that even good faith actions can be deemed arbitrary if they are taken without a rational basis and result in fundamental unfairness to the employee. *Barr*, 868 F.2d at 43-44 (citing *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 645 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986)).

Second, the Court of Appeals did not "refuse[] to recognize" that "perfunctory" processing of a member's grievance would constitute arbitrary conduct under *Vaca* and *Hines*.

(Petition at 17-T8) Rather, the Second Circuit found that the facts did not support petitioner's assertion that the union had acted in a perfunctory manner. Petitioner proved "[a]t most [that there] may have been errors of judgment," *Barr*, 868 F.2d at 43, which cannot amount to a breach of duty under any definition of arbitrariness. See *Hines*, 424 U.S. at 570-71. That petitioner disagrees with the court below and believes that the union's errors reflected perfunctory conduct rather than bad judgment is not a basis for granting the writ.

Third, the Court of Appeals did not create a new "obstacle" (Petition at 18) by holding that "tactical" decisions cannot form the basis of a breach of the duty of fair representation. Tactical decisions are by their very nature exercises of judgment, and as shown above, the principle that errors in judgment cannot constitute a breach of the duty of fair representation is hardly new. *Id.*

Nor did the court below hold that a union's claim that its "actions were motivated by tactical considerations is not susceptible to attack" (Petition at 18) The decision of the Court of Appeals indicated clearly that the result could have been different if petitioner had adduced evidence that "detract[ed] from [the finding] that any errors Local 804 might have made were of a tactical nature." *Barr*, 868 F.2d at 44. Hence, a union's claim that its actions were tactical can still be exposed as pretextual. Here, however, petitioner simply failed to prove his assertion that the union did something more than make good-faith tactical decisions.

Finally, the Court of Appeals' holding was in full accord with the decisions of other circuits. While various circuits have differed in the precise formulation of what constitutes "arbitrary" conduct, the conflict among the circuits described by petitioner (Petition at 14-17) involves an issue that had no bearing on the outcome of this case.

With respect to the pertinent and sole legal principle underlying the result below—that a union's errors in judgment or negligence are insufficient to establish a breach of the duty of fair representation—the circuits are in complete accord. *Parker v.*

Conners Steel Co., 855 F.2d 1510, 1520-21 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989) (“ ‘Cases are uniform in holding that neither negligence on the part of the union nor a mistake in judgment is sufficient to support a claim that the union acted in an arbitrary and perfunctory manner.’ ”) (citation omitted); *see Barr*, 868 F.2d at 43-44 (2d Cir. 1989); *Dement v. Richmond, Fredericksburg & Potomac Railroad Co.*, 845 F.2d 451, 460 n.17 (4th Cir. 1988); *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988); *Stevens v. Highway, City & Air Freight Drivers, Local Union No. 600*, 794 F.2d 376, 378 (8th Cir. 1986); *Demars v. General Dynamics Corp.*, 779 F.2d 95, 98 (1st Cir. 1985); *Rupe v. Spector Freight Systems, Inc.*, 679 F.2d 685, 692 (7th Cir. 1982); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1211-12 (6th Cir. 1981), *aff’d*, 707 F.2d 259 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983); *Findley v. Jones Motor Freight*, 639 F.2d 953, 960 n.2 (3d Cir. 1981). Thus, the result below would have been the same in every circuit that has ruled on the issue presented.

In essence, the petition merely challenges the Court of Appeals’ factual determination that the evidence was insufficient to establish anything more than non-actionable judgmental errors by the union. Petitioner’s disagreement with that evaluation of the evidence does not merit review by this Court.

II.

The Appellate Court Applied The Correct Standard For Ruling On A Motion For Judgment Notwithstanding The Verdict.

The standard for ruling on a motion for judgment notwithstanding the verdict is well settled. As on a motion for summary judgment or for a directed verdict, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986), a motion for judgment notwithstanding the verdict should be granted where the evidence is such that a reasonable jury “could not arrive at a verdict” against the movant. *E.g., Lopez v. McLean Trucking Co.*, 798 F.2d 611, 614 (2d Cir. 1986).

There is no basis for petitioner's contention (Petition at 23) that the Court of Appeals "neither articulated nor applied" this standard. The court's statement of the standard was entirely accurate:

The evidence presented was not sufficient to support a verdict that the union failed to fulfil its duty of fair representation

Barr, 868 F.2d at 43.

Its application of the standard was equally correct. At trial and in the court below, petitioner asserted two theories in support of his duty of fair representation claim: (1) that the union had conspired with UPS to terminate petitioner, and (2) that the union's alleged errors during the grievance process rose to the level of arbitrariness. After a thorough review of the record, the Court of Appeals concluded that "not a scintilla of evidence" supported petitioner's first theory and that the evidence "indubitably" failed to support his second theory. *Id.* Faced with no evidence whatever supporting either of petitioner's claims, the court properly reached the unavoidable conclusion that no reasonable jury could have returned a verdict for petitioner.

CONCLUSION

Petitioner has raised no issue of sufficient significance to warrant the exercise of this Court's supervisory authority. The petition for a writ of certiorari should therefore be denied.

Dated: November 1, 1989

Respectfully submitted,

JEFFREY A. MISHKIN
PROSKAUER ROSE GOETZ & MENDELSON
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel for Respondent
United Parcel Service, Inc.

Of Counsel

ALEXANDER H. SCHMIDT